No. 88-1959

JUL 5 1989

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MELVIN A. HELLER and JERROLD L. MORRIS,

Petitioners,

vs.

ILLINOIS ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

JAMES J. GROGAN
203 North Wabash Avenue
Suite 1900
Chicago, Illinois 60601
(312) 346-0690
Attorney for Respondent

Of Counsel:
RUTHE A. HOWES
Counsel for Administrator

Photex — 444 North Wabash Avenue — Chicago 60611 — 321-0223

BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. Whether Petitioners failed to invoke federal jurisdiction pursuant to 28 U.S.C. § 1257(3).

II. Whether procedures employed by the Supreme Court of Illinois imposing discipline on Petitioners for their repeated violations of long-established ethical principles violated the Due Process requirement of the Fourteenth Amendment.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES . . . . . iii, iv

CONSTITUTIONAL PROVISION AND RULES INVOLVED 2, 3

STATEMENT OF THE CASE. 3

SUMMARY OF ARGUMENT. 8

ARGUMENT 10

I. Petitioner failed to invoke federal jurisdiction pursuant to 28 U.S.C. § 1257(3). 10

II. Procedures employed by the Supreme Court of Illinois imposing discipline on Petitioners for their repeated violations of long-established ethical principles did not violate the Due Process requirement of the Fourteenth Amendment. .14

CONCLUSION. 22

TABLE OF AUTHORITIES

Cases: Page

Brinkerhoff-Farris Trust Co, v. Hill, 281 U.S. 673 (1930).....13

Consolidated Turnpike Co. v. Norfolk and Ocena View Railway Co., 228 U.S. 326 (1913).....11, 12

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).....15

Great Northern Railway Co. v. Sunburst Oil and Refining Co., 287 U.S. 358 (1932).....12

In re Anastaplo, 3 Ill.2d 471, 121 N.E.2d 826 (1954).....14

In re Daley, 549 F.2d 469 (7th Cir., cert denied, 434 U.S. 829, (1977)).....18, 19

In re Donaghy, 402 Ill. 120, 83 N.E.2d 560 (1948).....15

In re Heller, 126 Ill.2d 94, 533 N.E.2d 824 (1988).....passim

In re March, 71 Ill.2d 382, 376 N.E.2d 213 (1978).....18

In re Neff, 83 Ill.2d 20, 413 N.E.2d 1282 (1980).....15

In re Ruffalo, 390 U.S. 544 (1968).....10,19

Middlesex County Ethics Committee, etc. v. Garden State Bar Ass'n, 457 U.S. 423 (1982).....21

Missouri Insurance Co. v. Gehner, 281 U.S. 313 (1930).....13

People ex rel Chicago Bar Ass'n v. Baker, 311 Ill. 66, 142 N.E.2d 554 (1924).....15

Spevack v. Klein, 385 U.S. 511 (1967).....16

CONSTITUTION:

U.S. CONST. Amend XIV.....passim

STATUTES:

28 U.S.C. § 1257.....passim

107 Ill.2d Rule 753.....3, 5

107 Ill.2d Rule 771.....passim

No. 88-1959

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MELVIN A. HELLER & JERROLD L. MORRIS

Petitioners,

vs.

ATTORNEY REGISTRATION
AND DISCIPLINARY COMMISSION
OF THE SUPREME COURT OF ILLINOIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

RESPONDENT'S BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISIONS INVOLVED

Nor shall any State deprive any person of life, liberty, or property, without due process of law; U.S. CONST. amend. XIV.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. 28 U.S.C. § 1257.

RULES OF THE SUPREME COURT OF ILLINOIS AND ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION

Supreme Court Rule 753(c)(6). Inquiry, Hearing, and Review Boards. Except as otherwise expressly provided in these rules, the standard of proof in all hearings shall be clear and convincing evidence.

Supreme Court Rule 771. Types of Discipline.

(a) disbarment;
(b) disbarment of consent;

(c) suspension for a specified period and until further order of court;
(d) suspension for a specified period of time;
(e) suspension until further order of the court;
(f) suspension for a specified period of time or until further order of the court with probation; or
(g) censure.

STATEMENT OF THE CASE

On September 5, 1986 the Administrator of the Attorney Registration and Disciplinary Commission filed a six count complaint against Petitioners pursuant to Illinois Supreme Court Rule 753. The complaint charged Petitioners with engaging in actions prejudicial to the administration of justice; lending or giving a thing of value to a judicial officer; circumventing a disciplinary rule through the actions of another; engaging in conduct involving

dishonesty, fraud, deceit and misrepresentation; failing to avoid even the appearance of impropriety; and engaging in actions that tend to bring the Court and legal profession into disrepute. Counts I-V alleged that Petitioners made, guaranteed or facilitated in loans to Judge Reginald Holzer. Count VI alleged that Petitioner Heller paid Judge Holzer to assist Heller's son in gaining admission into a local law school.

On February 24, 1987, a panel of the Hearing Board issued a report and recommendation finding that Petitioners were guilty by a preponderance of the evidence of the misconduct alleged in Counts I, II, III, IV and V of the Administrator's complaint. The Hearing Panel found that the misconduct alleged in Count

VI had not been proven. The Hearing Board recommended disbarment for both Petitioners. On March 19, 1987, Petitioners filed exceptions to the report and recommendation of the Hearing Board.

On July 15, 1987, the Review Board remanded the case to the hearing panel for such further proceedings as the panel deemed appropriate and to submit findings, conclusions and recommendations based upon a standard of clear and convincing evidence as set forth in Illinois Supreme Court Rule 753(c)(6). Further, the Review Board directed the Hearing Panel to make individual findings, conclusions and recommendations as to each Petitioner.

On September 30, 1987, the Hearing Panel issued its revised

report and recommendations, after finding that additional proceedings were unwarranted. The Hearing Board concluded that the Administrator had proven by clear and convincing evidence that the Petitioners were guilty of the misconduct charged in the Administrator's complaint. The panel recommended disbarment. The Petitioners filed exceptions to the revised report of the Hearing Board.

On January 13, 1988, the Review Board issued its report and recommendation finding that the Hearing Board complied with its order of remand. The Review Board further concurred with the finding of fact and conclusions of law of the Hearing Panel and recommended that Petitioners be disbarred. The Petitioners filed exceptions to the report of the Review Board with the

Supreme Court of Illinois.

On December 6, 1988, after considering briefs and oral arguments, the Supreme Court of Illinois issued an order disbarring Petitioners from the practice of law.

On December 27, 1988, Petitioners filed a Petition for Rehearing with the Supreme Court of Illinois, raising a federal question for the first time. On January 30, 1989, the Supreme Court of Illinois denied the petition without ruling on the federal question. (Pet.App. 14).

On February 2, 1989, Petitioners filed a Motion to Stay Mandate with the Supreme Court of Illinois so as to permit Petitioners to seek review in the Supreme Court of the United States. On February 7, 1989, the Supreme Court of Illinois issued an

order staying the mandate.

On May 30, 1989, Petitioners served Respondent with copies of their Petition for Writ of Certiorari to the Supreme Court of the United States.

On June 26, 1989 Petitioners filed a Motion to File an Amended Petition for Writ of Certiorari. In their Amended Petition, Petitioners raise certain issues discussed below.

SUMMARY OF ARGUMENT

The Amended Petition of Writ of Certiorari to the Supreme Court of Illinois should be denied for the following reasons:

First, Petitioners failed to invoke federal jurisdiction pursuant to 28 U.S.C. § 1257(3). Petitioners did not raise any federal

constitutional claim until filing a petition for rehearing before the Supreme Court of Illinois. Petitioners have not demonstrated that they fit within any exception as they had reason to expect that the Court would decide the case as it did.

Second, Petitioners were not denied due process of law during the course of the disciplinary proceedings against them, nor have petitioners been deprived of a property right. A license to practice law is a privilege not an absolute right. Licensing of attorneys in Illinois is within the inherent authority of the Supreme Court of Illinois. A grant of immunity in exchange for testimony in a federal prosecution protects petitioners from criminal

proceedings, but does not extend to disciplinary proceedings. The two proceedings are clearly separate and distinctive. Petitioners received notice of the charges and an opportunity to defend in complete compliance with the due process requirements as mandated in In re Ruffalo, 390 U.S. 544 (1968).

ARGUMENT

I. PETITIONERS FAILED TO INVOKE FEDERAL JURISDICTION PURSUANT TO 28 U.S.C. § 1257(3).

Petitioners are required to demonstrate in their petition that this Court has jurisdiction to review the judgment of the Supreme Court of Illinois. Petitioners have failed to do so.

Petitioners first raised their federal constitutional claim of a denial of due process in their

petition for rehearing after the judgment of the Supreme Court of Illinois.

Raising a federal question for the first time in a petition for rehearing addressed to the highest state court is generally insufficient to invoke federal jurisdiction unless the court actually entertains the petition and expressly decides the question. Consolidated Turnpike Co. v. Norfolk and Ocean View Railway Co., 228 U.S. 326, 334 (1913). As the Illinois Supreme Court denied the petition in the instant case without entertaining the federal question (Pet.App. B), the general rule precludes review by this Court. To constitute a reviewable judgment under such circumstances, the order denying the petition for rehearing must be more than a cursory

recitation that the petition has been fully or maturely considered and is accordingly denied. Consolidated Turnpike Co. v. Norfolk and Ocean View Railroad Co., 228 U.S. 326, 333-334 (1913).

In order to invoke the jurisdiction of this Court to review a constitutional claim not timely presented to the Supreme Court of Illinois, Petitioners must establish that their case fits within an exception. Great Northern Railway Co. v. Sunburst Oil and Refining Co., 287 U.S. 358, 367 (1932). Petitioners have not set forth any claim nor authority asserting that they fit within an exception. The only exception Petitioners could possibly claim is that the Illinois Supreme Court rendered an unexpected decision, giving them no prior

opportunity to anticipate or assert their federal claim, and the petition for rehearing constitutes their first and only chance to present the matter to that court. Brinkerhoff-Farris Trust Co. v. Hill, 281 U.S. 673, 677-78 (1930); Missouri Insurance Co. v. Gehner, 281 U.S. 313, 320 (1930). Petitioners clearly fail to meet this test. First, Illinois Supreme Court Rule 771 provides for types of discipline that may be imposed for professional misconduct, including disbarment. Second, the Administrator has urged disbarment throughout the course of the disciplinary proceeding, and the Hearing Board and Review Board have recommended disbarment. (Pet.App. C, D). Thus, Petitioners cannot assert that the Court's decision was unexpected or a surprise.

II. THE PROCEDURES EMPLOYED BY THE SUPREME COURT OF ILLINOIS IMPOSING DISCIPLINE ON PETITIONERS FOR THEIR REPEATED VIOLATIONS LONG-ESTABLISHED ETHICAL PRINCIPLES VIOLATED THE DUE PROCESS REQUIREMENT OF THE FOURTEENTH AMENDMENT.

Petitioners erroneously contend that the procedure by which an attorney is granted immunity from criminal prosecution is a deprivation of a property right, i.e. his law license, without due process. Petitioners specious argument fails for several reasons. First, Petitioners base their argument on the fallacious premise that a law license is a property right. It is well established that the right to practice law is a privilege. In re Anastaplo, 3 Ill.2d 471, 121 N.E.2d 826 (1954). Membership in the legal profession and engaging in the practice of law is a privilege and

not an absolute right (People ex rel. Chicago Bar Ass'n v. Baker, 311 Ill. 66, 142 N.E.2d 554, 31 A.L.R. 737), and no attorney will be permitted to engage in the conduct of his profession in such a manner as to bring the same into disrepute. In re Donaghy, 402 Ill.120, 83 N.E.2d 560, 562 (1948).

Lawyer discipline is within the inherent authority of the state courts. See Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975). Petitioners' law licenses, like those of all other Illinois attorneys', are a privilege granted by the Supreme Court of Illinois to persons deemed to be fit to practice law. Supervision of attorney conduct is one of the most crucial functions of the Supreme Court of Illinois. See In re Neff, 83 Ill.2d 20, 413 N.E.2d

1282, 1284 (1980). With regard to Petitioners' misconduct, the Court stated that "for a period of over eight years, petitioners continued to practice before a judge whom they had repeatedly assisted with loans. Such flagrant and continuous disregard for the integrity of our legal system cannot be countenanced." In re Heller, 126 Ill.2d 94, 533 N.E.2d 824, 830 (1988). For these reasons, Petitioners lost their privilege to practice law. (emphasis supplied). Thus, Petitioners' argument is baseless because Petitioners never had a property right of which they could be deprived.

Even if, arguendo, a law license could be considered a property right, Petitioners' argument is without merit. Petitioners cite Spevak v. Klein, 385 U.S. 511 (1967) for the

proposition that an attorney cannot be deprived of his right against self-incrimination by the threat of suspension or disbarment. This proposition is not applicable to the instant case. Petitioners state throughout their brief that Morris was aware at the time he testified in the federal prosecution of Holzer that his grant of immunity did not extend to any prosecution by the Attorney Registration and Disciplinary Commission for unethical conduct. (Pet.Br. 16, 28). Petitioners were disbarred for their reprehensible conduct, not for refusing to cooperate in their disciplinary proceeding. Furthermore, as Petitioners point out in their brief, they cooperated with the Attorney Registration and Disciplinary Commission in their

disciplinary proceeding. At no time during this proceeding did Petitioners assert any claim of their Fifth Amendment rights to protection against self-incrimination or allege a violation of due process.

The authority cited by Petitioners in their brief wholly supports the Administrator's position. In re March, 71 Ill.2d 382, 376 N.E.2d 213 (1978) and In re Daley, 59 F.2d 469 (7th Cir. 1977) both establish that a clear distinction exists between disciplinary proceedings and criminal proceedings. While a grant of immunity is a protection against subsequent criminal proceedings, it is inapposite to attorney disciplinary proceedings. The essence of criminal proceedings is "intended to a redress criminal

wrongs by imposing sentences of imprisonment, other types of detention or commitment, or fines," while the function of disciplinary proceedings is to determine whether an attorney "retains the attribute of moral fitness which is requisite to the fulfillment of an attorney's responsibilities to the court which licensed him, as well as to the public." 549 F.2d at 475. A review of these cases clearly establishes that Petitioners' Fourteenth Amendment due process rights were not violated.

In In re Ruffalo, 390 U.S. 544 (1967), this Court stated that an attorney in a disciplinary proceeding is entitled to due process to the extent that he receives notice of the charge and an opportunity to be heard. Id. at 550. Both

requirements have been met. Petitioners had notice that they were charged with making numerous proscribed loans to a judge. They were afforded ample opportunity to defend the charges and they did so in a vigorous manner.

In addition, Supreme Court Rule 771 provides Petitioners with sufficient notice that the state court had the authority to impose discipline ranging from censure to disbarment upon any finding of misconduct. 107 Ill.2d Rule 771. The Hearing Board and Review Board recommended disbarment and the Illinois Supreme Court ultimately agreed. Thus, no substantial federal question exists.

In summary, Petitioners' argument is totally devoid of legal authority. As a matter of law, a

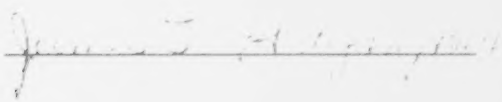
license to practice law is a privilege, not a right. A grant of immunity includes only criminal proceedings, not attorney disciplinary proceedings. The procedure employed, which resulted in the disbarment of Petitioners, is not violative of the Fourteenth Amendment, but "necessary to achieve the goal of safeguarding the public, maintaining the integrity of the profession and protecting the administration of justice." See Middlesex County Ethics Committee, etc. v. Garden State Bar Association, et. al., 457 U.S. 423, 434-35 (1982). Petitioners speciously assert that this Court should resolve certain questions under the Due Process Clause. A review of the applicable case law clearly establishes that such questions have already been

resolved. Petitioners sole purpose underlying this petition is to delay the issuance of the mandate of the Supreme Court of Illinois disbarring Petitioners.

CONCLUSION

For the reasons set forth above, Respondent respectfully submits the Petition for Writ of Certiorari be denied.

Respectfully submitted,



James J. Grogan
203 North Wabash Avenue
Suite 1900
Chicago, Illinois 60601
(312) 346-0690

Attorney for Respondent